

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

THOMAS E. HORNISH AND SUZANNE )  
J. HORNISH JOINT LIVING TRUST, )  
et al, ) CASE NO. C15-284MJP  
Plaintiffs, )  
v. ) SEATTLE, WASHINGTON  
KING COUNTY, ) April 14, 2016  
Defendant. )  
MOTION FOR )  
SUMMARY JUDGMENT )

VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE MARSHA J. PECHMAN  
UNITED STATES DISTRICT JUDGE

## APPEARANCES:

For the Plaintiffs: THOMAS S. STEWART  
ELIZABETH McCULLEY  
Stewart Wald & McCulley LLC  
2100 Central, Suite 22  
Kansas City, MO 64108

For the Defendant:       DAVID HACKETT  
King County Prosecutor's Office  
500 4th Avenue  
Seattle, WA 98104

DAVID FREEBURG  
EMILY HARRIS  
Corr Cronin  
2001 4th Avenue, Suite 3900  
Seattle, WA 98154

Reported by: NANCY L. BAUER, CCR, RPR  
Federal Court Reporter  
700 Stewart Street, Suite 17205  
Seattle, WA 98101  
(206) 370-8506  
nancy.bauer@wawd.uscourts.gov

1 April 14, 2016

1:30 p.m.

2 PROCEEDINGS

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3 THE CLERK: Thomas Hornish v. King County, Cause No.  
4 C15-284.

5 Counsel, please make your appearances for the record.

6 MR. HACKETT: David Hackett representing King County,  
7 the defendants, and with me is Emily Harris and David  
8 Freeburg, also representing King County.

9 THE COURT: Good afternoon.

10 MR. STEWART: Thank you, Your Honor. Tom Stewart and  
11 my partner, Elizabeth McCulley, for the plaintiffs.

12 THE COURT: Counsel, you should have received a set  
13 of questions that I'd like to have you address at some point  
14 during the course of your argument, and I'd ask you to meet  
15 and confer and decide the order of argument. I got a little  
16 bit of back-and-forth. What can you tell me is your final  
17 decision about that?

18 MR. HACKETT: I believe we have a consensus, Your  
19 Honor, that I will go first for 20 minutes, and then  
20 Mr. Stewart will go. I'll have a ten-minute rebuttal, and  
21 then Mr. Stewart will finish up.

22 THE COURT: Okay.

23 MR. HACKETT: Good afternoon, Your Honor. I thought  
24 it would be appropriate to turn immediately to the court's  
25 questions so that those don't get lost in the time crunch.

1       The court's first question about whether plaintiffs  
2       dispute that King County has paid the taxes on the disputed  
3       corridor, as the record currently stands, there is no  
4       evidence from plaintiffs disputing King County's payment of  
5       taxes and fees on that corridor. In fact, the declaration of  
6       Sue Sweany, which is attached to my declaration -- or,  
7       actually, it is filed separately, is uncontroverted to this  
8       point. It establishes that King County has paid all taxes  
9       due and fees since 1998.

10       The second question, are there any disputed facts which  
11       would prevent the court from deciding the case as a matter of  
12       law? We believe that the correct answer to that question is  
13       no. The plaintiffs have failed to controvert the relevant  
14       facts that are appropriate to this. They have, essentially,  
15       one declaration from Mr. Morel and another declaration from  
16       Mr. Rall, both which have substantial portions that are  
17       inadmissible, but both of which have failed to directly or  
18       indirectly address the issues that are before the court.  
19       I'll try and explain that further as I go through.

20       The Rall declaration, as I stated, we believe it is  
21       conclusory and inadmissible. The Morel declaration simply  
22       states that his family used the railroad property. It does  
23       not establish any right, i.e., like an adverse possession  
24       right or some right that would give him ownership over the  
25       property, and, in fact, his 1996 deed -- his family's 1996

1 deed with the railroad recognized the 100-foot corridor and  
2 bought the outer 25 feet on each side from the railroad. So  
3 Mr. Morel cannot get past his own chain of title in that  
4 regard.

5 The third question, how do plaintiffs respond to the  
6 county's argument that possession has been established  
7 through operation of RCW 7.28.070, the payment of taxes  
8 statute? In their response materials, plaintiffs simply did  
9 not respond to this. They instead argued to the court that,  
10 procedurally, it should not be in front of the court. We  
11 addressed that very clearly in our reply, pointing out that  
12 in our counterclaim we cited RCW Chapter 7.28 and provided  
13 more than sufficient facts under notice pleading to alert all  
14 parties that the width of the corridor was at issue and that  
15 we, of course, would be raising 7.28 as one of the reasons  
16 that our easement was established in that corridor.

17 7.28.070, unlike a regular adverse possession or  
18 prescriptive easement, when you are holding a property under  
19 color of title under that statute, as the State Supreme Court  
20 has said and as the statute says, you own to the extent of  
21 your paper title, so you own to the boundaries that are  
22 actually stated in the paper title, and on this record there  
23 is no dispute that those boundaries in the adverse possession  
24 areas are 100 feet, except where there have been specific  
25 prior transactions, like the one between Mr. Morel and the

1 railroad. In that case, of course, it is 50 feet. But that  
2 paper title establishes the primary issue in dispute in this  
3 case.

4 The fourth question, what evidence do plaintiffs have that  
5 a 100-foot corridor is not necessary for operations  
6 permissible under a railroad easement? We have cited to the  
7 court the case law that a railroad easement, even when it's  
8 obtained through a prescriptive easement or adverse  
9 possession, recognizes that you are not limited solely to the  
10 ballast and the tracks, but that it includes what is  
11 necessary to run a railroad.

12 In this regard, the court has substantial evidence for it.  
13 The declaration from Mr. Nuorala, which is attached to my  
14 declaration, made back in the early '90s. Mr. Nuorala worked  
15 for BNSF and explained why the railroad needed that safety  
16 zone, both to maintain its tracks and to make sure that  
17 derailments and things like that did not impact adjacent  
18 homeowners.

19 The Sullivan declaration that we submitted, also attached  
20 to my declaration, is also not controverted.

21 And then, finally, the court has the overall layout of the  
22 corridor, and that corridor, as the STB points out, is  
23 between -- is generally 100 feet wide. It varies sometimes  
24 down to 50 and sometimes as much as 200, but the overwhelming  
25 both sides of the adverse possession area are 100 feet, so it

1 makes sense to continue that 100 feet.

2 And then finally is the issue of what the county can do  
3 with the land rights. We would say that the issue of  
4 declaratory judgment as to the nature of rights in that  
5 property is ripe. Understanding that we own a railroad  
6 easement, that that railroad easement gives us exclusive use  
7 and control and possession, and that that railroad easement,  
8 consistent with Washington case law, allows incidental uses  
9 that are consistent with the easement itself.

10 The issue of building the trail, of course, is ripe. King  
11 County is in the process of doing that. These plaintiffs,  
12 through the *Shore Line* action, are challenging that.

13 The question of are other specific incidental uses ripe,  
14 we would argue that they are not ripe at this point. Once  
15 the parties know what their relative rights are, i.e., that  
16 we have a railroad easement that is consistent with  
17 Washington law, we can make incidental uses of that easement,  
18 build a trail. If some use comes to light or if some use is  
19 proposed on specific use down the road, at that point  
20 adjudicating that use within that context of rights  
21 established in this action we think would be ripe, but the  
22 court does not need to, you know, determine if overhead power  
23 lines are appropriate, or if train tracks are appropriate, or  
24 any of the things that go on in the *Kaseburg* matter, because  
25 no one is proposing those uses. We're talking about a trail,

1 and we're talking about continued use of the railroad  
2 easement during the life of that trail, and possible future  
3 activation.

4 So while the briefing in this case is complicated, it  
5 basically boils down to two overarching issues, and the first  
6 overarching issue would be due to railbanking under the  
7 Trails Act. King County holds BNSF's prior property rights,  
8 plus new trial rights established by federal law.

9 What we are arguing here is that railbanking preserved all  
10 of BNSF's property rights, including any portion of the  
11 corridor that they held as an easement.

12 We are arguing that Washington's railroad easement, that  
13 concept within Washington law, consistent with *Kaseburg*,  
14 allows for exclusive use and possession of the area on,  
15 above, and below the surface of the corridor, plus incidental  
16 uses consistent with Washington law.

17 And then, finally, we're arguing, as BNSF's successor,  
18 King County holds the rights that BNSF held, plus a trail,  
19 the right to build a trail under the Trails Act.

20 So that's the first overarching idea. The impact of the  
21 Trails Act and the continuation of BNSF easements, which have  
22 existed in that area for about 125 years.

23 The second overarching question is plaintiffs' lack of  
24 Article III standing to challenge King County's ownership,  
25 because they do not own any portion of the corridor

1     whatsoever.

2             King County owns the portion of the corridor next to the  
3     Hornish plaintiffs in fee, as we will argue below, that the  
4     remaining plaintiffs, except where narrowed by private  
5     transactions, the record establishes that King County owns a  
6     100-foot railroad easement over those properties, and that  
7     would be through operation of 7.28, through the 1895 assessor  
8     records, the 1908 probate action, and the 1917 val maps.

9             And then, finally, looking at Washington Centerline  
10    Presumption, none of plaintiffs' current deeds allow them to  
11    claim to the centerline of the railroad property, and that's  
12    especially true for Mr. Hornish, since the property next to  
13    him is owned in fee.

14            So I'll turn more specifically to those, and, of course,  
15    be happy to answer any questions the court may have.

16            First, railbanking did preserve the BNSF property rights  
17    for King County's purchase, which we did purchase, and added  
18    the right to have a public trail over that property.

19            The Trails Act, by its very language, preempted any  
20    abandonment of BNSF's railroad easements, the portions of the  
21    corridor that were held in easement. Under the Trails Act,  
22    which is, as the court is aware, at 16 U.S.C. 1247(d), it  
23    states that the national policy is, quote, to preserve  
24    established railroad rights-of-way for future reactivation of  
25    rail service, end quote, and, quote, to protect rail

1 transportation corridors, end quote. Those are the purposes  
2 of the Act. Congress is explicit in its purpose here.

3 The way Congress achieves those purposes is by using the  
4 mechanism of federal preemption. It uses preemption to  
5 abandon any state law or to preempt any state law or state  
6 doctrine that would result in abandonment of the easement.  
7 And under the Trails Act, interim trail use is allowed, and  
8 such interim use, quote, shall not be treated, for purposes  
9 of any law or rule of law, as an abandonment of the use of  
10 such rights of way for railroad purposes.

11 So, thus, you have the purpose of the Act and the  
12 mechanism by which the Act achieves that purpose by  
13 preventing state law abandonment.

14 The result of preempting state law, abandonment law, is  
15 the existing state railroad easement, and the corridor that  
16 is created by that easement remains in full effect right now  
17 and forever in the future, as long as the Trails Act, at  
18 least, is around.

19 The railroad easement that BNSF held and that King County  
20 bought remains recorded under state property law. You can go  
21 down to the county courthouse, you can look up those parcel  
22 numbers, and you can see who owns it. And trail use is added  
23 via the Service Transportation Board's issuance of the need  
24 to. A very straightforward mechanism that Congress has  
25 adopted.

1 Plaintiffs' railroad purposes argument to get around this  
2 explicit language is, frankly, irrelevant. As Judge  
3 Coughenour decided in *Kaseburg*, quote, it is immaterial  
4 whether railbanking is a railroad purpose, because the Trails  
5 Act preserves a railroad easement and preempts state  
6 reversion law through the mechanism of railbanking,  
7 regardless of the easement's original purchase. That's what  
8 Congress did.

9 There is no support for plaintiffs' claim of an elaborate  
10 mechanism where the state railroad easement goes away, is  
11 extinguished, and then somehow magically comes back after  
12 being held in abeyance for some undefined period of time,  
13 years and years down the road should a railroad return.

14 This plaintiff approach would leave the court with a  
15 practical problem that would thwart the very purposes of the  
16 Trails Act. Plaintiffs are telling us that they are able to  
17 use the corridor for any purpose as long as it does not  
18 interfere with the trail. What we know from the records,  
19 according to Mr. Morel, is that includes things like houses,  
20 trees, sheds, shacks, gazebos, roads, whatever -- whatever  
21 they can imagine, as long as it doesn't bisect the trail or  
22 prevent the public from using the trail.

23 If indeed the court can imagine a built-up corridor 20  
24 years from now, it would be nearly impossible for a railroad  
25 to be reactivated. That's why the STB regulations and the

1 case law puts the responsibility on the trail sponsor, which  
2 is King County, which also happens to be the owner of the  
3 BNSF property rights, to make sure and keep that corridor in  
4 shape so that reactivation is a possibility.

5 Plaintiffs fail to dispute the scope of a Washington  
6 railroad easement at all. There is no briefing addressed to  
7 this. Washington case law is clear that a Washington  
8 railroad easement allows for exclusive use and possession of  
9 the area on, above, and below the surface of the corridor,  
10 plus incidental uses consistent with Washington law. That's  
11 what Judge Coughenour held in *Kaseburg*, and that's what we'd  
12 also ask this court to hold.

13 It's also undisputed that King County is the purchaser and  
14 the successor-in-interest to BNSF's property rights along the  
15 corridor. That would include the fee portions of the  
16 corridor, like those next to Mr. Hornish, as well as any and  
17 all easement portions of the corridor.

18 So for these reasons, looking at the Trails Act aspect of  
19 this case, the court should enter summary judgment, finding  
20 that the Trails Act preserved those BNSF easements, that  
21 those easements, which are characterized properly as a  
22 Washington railroad easement, are broad and robust, and that  
23 King County currently owns those.

24 Turning to the standing question, plaintiffs simply do not  
25 have Article III standing to challenge King County's

1 ownership. King County owns the land -- and I'll address  
2 first the Hornish plaintiffs. King County owns that land in  
3 fee.

4 The deed language, which is the Hilchkanum deed, and I  
5 don't provide any warranty that I state that correctly at  
6 all, but nonetheless, the Hilchkanum deed was determined by  
7 the Ninth Circuit in *Rasmussen* and determined by the  
8 Washington Court of Appeals in *Ray* to establish a fee. That  
9 precedent should continue to be good law and should be  
10 binding, we would submit, on this court.

11 The only thing plaintiffs point out is the *Kershaw*  
12 decision, but *Kershaw* is not a tremendous change in  
13 Washington law. Washington law has always recognized that  
14 right-of-way has some ambiguities and that right-of-way is a  
15 term that can go either direction. Where *Kershaw* draws the  
16 line, consistent with *Brown* and all the other case law that  
17 was relied upon in both *Ray* and *Rasmussen*, is when the  
18 granting clause limits the conveyance of the right-of-way for  
19 a specific purpose. So, for instance, I give, grant, donate  
20 100 feet of rail -- or a corridor for the purpose of running  
21 a railroad, that would be a granting clause that would have  
22 that. This granting clause doesn't. It just says I grant,  
23 donate, convey, or something along those lines, 100 feet of  
24 property.

25 The other thing that you look at consistent with *Ray* and

1 *Rasmussen* is the addendum clause. This addendum clause is  
2 not limited in time to serving a particular purpose, like  
3 running a railroad. The conveyance is forever, and, thus, it  
4 is consistent with *Kershaw*, and it is fully analyzed and  
5 remains good law in *Rasmussen* and *Ray*.

6 King County owns the 100-foot railroad easement next to  
7 the remaining plaintiffs. And while there are some effort to  
8 create factual issues through the Morel declaration, the  
9 court can easily resolve this issue through reference to  
10 RCW 7.28.070, which is a seven-year statute of limitations  
11 when you hold a piece of property under good-faith color of  
12 title and you have paid all taxes due during that period.

13 In addition to that, you have historical documents which  
14 show acquiescence by Mr. Middleton, a common grantor to all  
15 plaintiffs. The 1895 assessor records for Mr. Middleton  
16 point out that a 100-foot railroad corridor, if you do the  
17 math, as in Mr. Nunnenkamp's declaration, was excluded from  
18 the property that he was taxed on.

19 The fact that this is consistent with Mr. Middleton's  
20 understanding is contained in the 1908 probate records, where  
21 the court decided that a railroad corridor ran through that  
22 land. These plaintiffs are in privity with those folks back  
23 in 1908 who received that property, and, thus, that court  
24 finding from Pierce County binds them, but it also points the  
25 court's attention to case law in our brief, which points out

1 that if you're Mr. Middleton, and you buy a piece of property  
2 with a railroad going through it, you can't be surprised  
3 about that railroad being there. Mr. Middleton couldn't be  
4 surprised, and certainly plaintiffs can't 125 years later.

5 And then, finally, the corridor is 100 feet because the  
6 declarations from Mr. Nuorala and Mr. Sullivan established  
7 that that's generally what you need to run a railroad, and  
8 also, as Mr. Sullivan points out, pretty close to what you  
9 would need to reactivate a railroad. To serve the purposes  
10 of the Trails Act, and consistent with the state law, the  
11 court should hold that the corridor next to the remaining  
12 plaintiffs is 100 feet and that King County owns a robust  
13 railroad easement over that stretch of the corridor.

14 Finally, I'd like to turn to the plaintiffs' lack of  
15 standing due to centerline presumption ownership.

16 The court allowed plaintiffs to, essentially, take a  
17 second bite at the apple, file an amended complaint to  
18 address the centerline issues that the court found in its  
19 prior orders. Plaintiffs did that. We have been waiting for  
20 summary judgment to move on that as to -- so the court could  
21 evaluate the success of plaintiffs' efforts. And the problem  
22 with plaintiffs' efforts are, as this court decided,  
23 Washington law establishes that you not only have to  
24 establish your chain of title, but your current deed has to  
25 allow inclusion to the centerline.

1           So in circumstances where the deed is drafted to accept  
2           the corridor, you cannot blame the corridor, because that  
3           would be thwarting the intent of the parties to the deed. In  
4           this case we have gone in great detail in our brief and  
5           pointed out, often using the court's prior analysis, where  
6           plaintiffs' legal descriptions have a metes and bounds that  
7           uses the corridor as a boundary. Washington case law is  
8           clear that that does not entitle them to the centerline  
9           presumption, and then the rest of the deeds use "except"  
10          language.

11          Now, plaintiffs point out that Mr. Rall, who is  
12          essentially trying to provide a legal opinion to this court,  
13          says that reserve is not the same, but these deeds don't use  
14          reserve, they use except, and there is no -- no clearer way  
15          for a grantor and a grantee to indicate their intent to the  
16          court and the subsequent purchasers that you own everything  
17          up to this point except the railroad corridor, and that's  
18          what those deeds state, and that's why the centerline  
19          presumption in Washington will not cross that boundary when  
20          it has been specifically excepted by the deed.

21          So for these reasons, we would ask the court to enter  
22          summary judgment for King County. This case has been  
23          resolved in King County's favor as a matter of law, and there  
24          are no controverted issues.

25          Thank you.

1 THE COURT: Thank you.

2 MR. STEWART: May it please the court, Your Honor.  
3 First, I'd like to thank the court for the opportunity today.  
4 As someone who has been really subsumed with the Trails Act  
5 for many years now, I appreciate the opportunity to actually  
6 argue about these issues.

7 This case obviously involves the intersection or collision  
8 of state property laws and the federal congressional act  
9 known as the Trails Act.

10 King County's argument and conclusion that the railroad  
11 purposes easement still exists is actually incorrect both as  
12 a matter of state law and federal law. And although I will  
13 answer all the court's questions as I go through this  
14 presentation, I think the very first issue that needs to be  
15 addressed is the point that Mr. Hackett attempted to make,  
16 that they own a railroad purposes easement. And I believe  
17 that is totally incorrect both as a matter of federal law and  
18 as a matter of state law.

19 And their argument that the railroad purposes easement  
20 still exists so that they can use the corridor in any fashion  
21 that they wish, what they're really attempting to do is just  
22 simply trample over these plaintiffs' property rights.

23 The ultimate result, as I will demonstrate, is that King  
24 County, by and through the Trails Act, only acquired a trail  
25 railbank easement with the right to build a hiking and biking

1 trail.

2 Because we have this collision of state law and federal  
3 property law, I think it's first important to take a step  
4 back and kind of define the chronology or the timeline of the  
5 facts in the context of these various legal principles.

6 And first we need to start with the proposition that, for  
7 purposes of these motions, that there really is no dispute  
8 for everyone that's involved here, except Mr. Hornish, who I  
9 will get to later, that the railroad only held an easement  
10 for railroad purposes, or at least there shouldn't be any  
11 dispute for purposes of these motions.

12 And we have been diverted somewhat from the basic  
13 principle when we discuss the scope of the railroad purposes  
14 easement, because it is actually somewhat of a red herring.

15 There has certainly been a lot of discussion about the  
16 scope of a railroad purposes easement under Washington law  
17 with respect to incidental uses. But the entire discussion  
18 concerning incidental uses is only relevant if the railroad  
19 purposes easement is still in place, and it's not.

20 The scope of the railroad purposes easement is important  
21 in this context, for purposes of these motions today, not  
22 because of incidental uses, but instead is really only  
23 relevant under state law property concepts, and that is  
24 because, under this chronology and these facts, a new  
25 easement, by and through the Trails Act, beyond the scope of

1 the existing railroad purposes easement, converts the  
2 railroad purposes easement to a trail railbank easement under  
3 state law and holds it in abeyance for the possible  
4 reactivation later.

5 And I think it is important, as Mr. Hackett mentioned, to  
6 also intervene with a second step in this process for a  
7 moment and take a closer look at what the Trails Act actually  
8 says and what it does.

9 The Trails Act amendments that we're talking about today,  
10 Section 1247(d), was passed by Congress in 1983. And there  
11 is no question but that the purpose of the Trails Act was to  
12 first and foremost encourage and promote recreational trails.  
13 These issues went to the United States Supreme Court in 1990  
14 in the first *Preseault* opinion, and the Supreme Court  
15 specifically talked about the history and purposes of the  
16 Trails Act.

17 It then went back on remand to the Federal Circuit in  
18 *Preseault II* in 1996. And *Preseault II*, in 1996, defined the  
19 nature of the property interest that the railroads acquire.  
20 The entire purpose of the Act was to encourage and establish  
21 hiking and biking trails by taking railroad corridors that  
22 would have been abandoned and that were actually abandoned  
23 but for the fact that the Trails Act intervenes, blocks the  
24 reversionary interest to the adjacent landowners so that a  
25 trail user can construct a hiking and biking trail on an

1 interim basis. And it is abandoned, but for the Trails Act,  
2 with this possible reactivation. That is what the Trails Act  
3 does. That is the railbanking provision of the Trails Act.

4 And it's interesting, because Mr. Hackett quotes part of  
5 Section 1247(d), and they talk about the fact that Congress  
6 says that the intent was to preserve established railroad  
7 rights-of-ways for future reactivation. And they protect  
8 those corridors so that the federal government can maintain  
9 jurisdiction over them rather than revert back to the  
10 adjacent landowners, and they can be held in abeyance so that  
11 the public can use them for a hiking and biking trail on an  
12 interim basis.

13 The Trails Act, an important point is, is it does not  
14 preserve rail corridors for current rail use, but rather  
15 preserves the former rail corridor for future rail use while  
16 allowing it to be used in the interim as a recreational  
17 trail. That is precisely and exactly what the Trails Act  
18 says.

19 Another way to look at it would be to say, what railroad  
20 purposes is it preserved for, when the only one with rights  
21 to use it for railroad purposes has abandoned it by and  
22 through the Trails Act.

23 Under Washington law, and this is really the law anywhere,  
24 conversion to a trail would be a taking, because the railroad  
25 easement would have extinguished, which is evidence that the

1 former railroad corridor cannot be used for incidental uses  
2 because trail use is not incidental to the railroad purposes  
3 easement. That is actually a direct quote and a finding from  
4 the Supreme Court of Washington in the *Lawson* opinion.

5 And railbanking, which is the preservation of railroad  
6 rights-of-way for future use, allows federal jurisdiction to  
7 remain, but it blocks the reversion to the adjacent  
8 landowners.

9 The third step in understanding what happens here is to  
10 actually look at the timeline of what occurs. The first  
11 thing that must occur is the railroad must petition to  
12 abandon the right-of-way, which is exactly what happened.  
13 Here, the first step in the process is that BNSF petitioned  
14 the STB to abandon it.

15 The second thing that occurred is that King County  
16 specifically requested the STB to determine if the  
17 right-of-way would be appropriate for interim trail use.

18 And, third, then the STB acts on that request, and allows  
19 it to be used for a hiking and biking trail.

20 Once the abandonment -- or once the railroad abandons it,  
21 and once there is an agreement to use it as a trail, the  
22 Trails Act then blocks reversion to the fee owner, which in  
23 this case is, basically, the adjacent landowners.

24 Now, this whole process is called railbanking, and  
25 railbanking does not preserve the railroad purposes easement

1 for current railroad uses under federal law, because  
2 railbanking is not a railroad purpose under federal law. And  
3 there are two primary reasons why King County cannot use it  
4 for current purposes other than a hiking and biking trail.

5 The first is that railbanking is not a railroad purpose  
6 under federal law, and the second is that the railroad  
7 purposes easement is extinguished, held in abeyance by the  
8 Trails Act, upon the change in use from a railroad purpose to  
9 a hiking and biking trail easement.

10 Now, I first want to talk a little bit about railbanking  
11 is not a railroad purpose. This is actually the result of  
12 overwhelming authority. It starts, really, with the Supreme  
13 Court in 1990 and the Federal Circuit in 1996. But there  
14 have probably been 50 or more cases that we've been involved  
15 with where the courts have found that railbanking is not a  
16 current railroad purpose and does not allow it to be used for  
17 current railroad purposes.

18 I can cite to all 50, but there are three that are  
19 important. Probably the first one is the Federal Circuit  
20 opinion in 1996, *Preseault II*, where they rejected the  
21 railbanking argument as allowing current railroad uses  
22 because it was a vague notion incapable of overriding the  
23 present use as a recreational trail.

24 The *Longnecker* case that we were involved in as well  
25 actually involved Washington law, down in Olympia, and the

1 federal court -- the Court of Federal Claims reiterated the  
2 exact same thing: That it does not allow current railroad  
3 uses.

4 And then, finally, in 2009, in the *Rogers* case in Florida,  
5 where they specifically said, here, as in *Preseault II*, the  
6 use of the right-of-way as a public trail while preserving  
7 the right-of-way for future railroad activity was not  
8 something contemplated by the original parties and exceeded  
9 the scope of the original railroad purposes easement.

10 The federal government, similar to what King County is  
11 doing here, has really attempted to make this argument, for  
12 years, that the railroad purposes easement exists, and that  
13 the hiking and biking trail easement is added to it, stacked  
14 on top of it, and that is simply not so. That argument made  
15 by the federal government, probably 50 times, has been  
16 rejected each and every time it was made.

17 A railbank easement, by definition, is the preservation of  
18 the railroad corridor for future railroad activities. That  
19 is exactly what the Trails Act says, and it is not the  
20 current right to use the railroad purposes easement.

21 And the second point I want to make in that regard is, if  
22 the railroad purposes easement was available for current uses  
23 as railroad purposes, there would never be any Trails Act  
24 takings cases. And the reason for that is, is that what is  
25 taken, what is blocked by the Trails Act are these

1 landowners' reversionary rights to get their land back. And  
2 if the railroad purposes easement still existed such that the  
3 hiking and biking trail easement was stacked on top of it,  
4 that reversionary interest would never vest because it was  
5 never taken from them in the first place.

6 THE COURT: Counsel, you've got to help me understand  
7 just exactly what your clients get out of this. Whether  
8 there's one easement or two rights stacked on top of each  
9 other, the land is going to be used as a trail.

10 MR. STEWART: It is going to be used as a trail, Your  
11 Honor, but --

12 THE COURT: So what is it that they're really looking  
13 for? Is it the 100 feet?

14 MR. STEWART: Well, that's one issue, Your Honor, and  
15 that's very important.

16 But to answer one of the questions that you asked last  
17 night is that, is what the county can do with the land an  
18 issue, and is what the county can do with the land right,  
19 yes, because -- and the question was what are the plaintiffs  
20 trying to stop? Keep in mind that this was the  
21 government's -- or the government -- King County's motion to  
22 say that the railroad purposes easement still exists so they  
23 can use it in any fashion they want.

24 And if there was a current use planned in addition to a  
25 hiking and biking trail, I think the court is absolutely

1 correct that that would be the subject of an injunction.

2 But here, though, this is a declaration of rights as to  
3 who owns the fee and the land. King County says they own the  
4 fee and the land, and we believe they do not. They own a  
5 hiking and biking trail easement pursuant to the Trails Act.  
6 And we want King County to stop trampling on these  
7 plaintiffs' property rights by claiming that they own the fee  
8 in this corridor.

9 Now, the issue of width is also extremely important, Your  
10 Honor, because there are a whole bunch of problems with the  
11 width, because not only are they claiming they own the fee,  
12 they're claiming they own the fee which is a hundred feet  
13 wide.

14 And the question that was asked last night was, what  
15 evidence do plaintiffs have that a 100-foot-wide corridor is  
16 not necessary for the operations permissible under a railroad  
17 easement, is not only the case law in Washington for decades,  
18 but what is necessary for railroad operations is what the  
19 railroad actually used.

20 And here, for a hundred years, what the railroad actually  
21 used is about 14 to 18 feet wide. And so the fact of the  
22 matter is that, besides Gene Morel's declaration, the width  
23 issue is huge, because they do not own -- even if they were  
24 deemed to own the fee, they don't own a fee 100 feet wide.  
25 It would be between 14 and 18 and probably 20 feet at every

1 location along this trail. And the best evidence of that is  
2 probably Mr. Morel's declaration, which would have, if they  
3 owned a hundred feet wide, it would be right in the middle of  
4 Mr. Morel's living room.

5 The other thing that is evident from Mr. Morel's  
6 declaration, and just a cursory examination of photographs of  
7 this area, is that there is a huge boulder that's been there  
8 for decades. Mr. Morel described how he actually climbed on  
9 that as a kid. The railroad right-of-way goes by there, and  
10 they, obviously, didn't move that boulder. It's 14-feet wide  
11 at that location.

12 In addition, all of these structures that Mr. Hackett  
13 talked about, Mr. Morel is a good example, where there's a  
14 driveway, there's concrete steps, there are plantings,  
15 shrubbery, all kinds of buildings on these sites. Many of  
16 these people own on both sides. They have a house on one  
17 side, and they have a lake house or a changing room or  
18 something else close to the lake.

19 The fact of the matter is, there is a wall that's been  
20 built decades ago that are describing exactly what the width  
21 of this corridor is that the railroad actually used. And so  
22 the width of this is a huge issue. And there is all kinds of  
23 issues associated -- fact issues associated with how wide  
24 this corridor is.

25 Let me -- before I finish on the width issue, Your Honor,

1 I want to make one other point, and that is the state law  
2 concepts here.

3 It is clear that under federal law the railroad corridor  
4 is not preserved for current uses. If it were, railbanking  
5 would be a railroad purpose.

6 If you look at -- what happens when the Trails Act is  
7 implemented, it blocks the abandonment that would ordinarily  
8 occur. So the landowners don't get their land back. But the  
9 second part of what occurs under state law is that the change  
10 in use from a railroad purposes easement to a hiking and  
11 biking trail easement operates to extinguish the railroad  
12 purposes easement under state law, and that's just basic  
13 property law. There should be no legal question or legal  
14 issue that trail use under the Trails Act does not fall  
15 within the scope of a railroad purposes easement. It's been  
16 said 50 times or more. It is also not added on to the  
17 railroad purposes easement.

18 In fact, one of the leading cases on that exact subject  
19 comes from the Supreme Court of Washington in *Lawson*. The  
20 railroad purposes easement extinguishes under state law  
21 because of the change-of-use that is permitted by the federal  
22 law.

23 And here's what happens: The railroad's easement  
24 extinguishes because of the changing use of a railroad  
25 purposes easement under state law due to the fact that it is

1 converted to a new easement under extensive and numerous  
2 authority. And what's interesting about that is, the Supreme  
3 Court of the United States, actually, cited *Lawson* with  
4 approval in the 1990 opinion, and it basically said,  
5 "Reference to state law has guided other courts seeking to  
6 determine whether a railroad right-of-way lapsed upon  
7 conversion to a trail use," and then cited *Lawson* for the  
8 proposition that the change in use would give effect to that  
9 reversionary interest.

10 THE COURT: Counsel, you're about to run out of  
11 time --

12 MR. STEWART: Oh, I'm sorry, Your Honor.

13 THE COURT: -- but I want to ask you what's your  
14 response to RCW 7.20 --

15 MR. STEWART: I'm happy to talk about that, Your  
16 Honor.

17 RCW 7.20.070 doesn't apply at all. It's preempted by the  
18 Trails Act, as Mr. Hackett said.

19 Federal jurisdiction -- the federal government has  
20 jurisdiction over these rights-of-way. The Trails Act has  
21 preempted those state statutes that disagreed with it. King  
22 County can't adversely possess against the federal  
23 government. Landowners still have their reversionary  
24 interest. Their reversionary interest has simply been  
25 blocked by the Trails Act.

1           THE COURT: Well, let's back up here. I might buy  
2           that they can't adversely possess against the government, but  
3           why is it that they can't adversely possess against your  
4           clients?

5           MR. STEWART: Because the Trails Act doesn't allow --  
6           they allow them to use it on an interim basis for a hiking  
7           and biking trail. There is nothing that allows them to  
8           transform a railroad purposes easement into fee ownership  
9           simply and solely by possessing it as a hiking and biking  
10          trail for seven years.

11          Otherwise, under any scenario where any trail user  
12          anywhere around the country utilized the trail for a  
13          seven-year period of time, they would then acquire fee  
14          ownership. That's not the law.

15          And if you look at the actual statute itself -- because  
16          one of the questions was whether King County pays taxes on it  
17          or not. First of all, they keep talking about color of  
18          title. Every person in actual, open, and meritorious  
19          possession of lands or tenements under claim and color of  
20          title, they received, purportedly, a quitclaim deed from the  
21          railroad. They do not -- which that quitclaim deed, even as  
22          Judge Coughenour indicated, is merely transferring what the  
23          railroad had. It had a railroad purposes easement.  
24          Vis-à-vis our landowners, the color of landowner doesn't work  
25          because there is no color of title versus our landowners.

1           And the irony of all ironies is, is that even if you look  
2           at Mr. Morel's declaration, if it's sauce for the goose, it's  
3           sauce for the gander, because if there was adverse possession  
4           for King County, all of these improvements that have been  
5           built within the hundred feet -- in Mr. Morel's case, up to  
6           about eight feet or ten feet from the centerline of the  
7           right-of-way that have been in there for a long time,  
8           decades, and all of the construction since 2000, he would  
9           then get adverse possession against the fee ownership because  
10          it's been there for decades.

11          And so they can't claim an adverse possession of a  
12          hundred-foot easement when the railroad only used it for 14  
13          feet in the first place. And if the statute works for King  
14          County, it also works for Mr. Morel and every other landowner  
15          along this right-of-way who's also built fences and parking  
16          and everything else along the right-of-way, too. They  
17          adversely --

18                THE COURT: Are you telling me that because the  
19                railroad didn't extend something or build something 100 feet  
20                out, that's all that's really left is the 14 feet?

21                MR. STEWART: That's correct, Your Honor, under  
22                Washington law.

23                In a prescriptive easement situation --

24                THE COURT: Counsel, you've run out of time.

25                MR. STEWART: Sorry, Your Honor. Thank you.

1 MR. HACKETT: Thank you, Your Honor.

2 I'd first like to briefly address this whole  
3 railroad-purposes-easement-not-existing-anymore argument.

4 Plaintiffs argue that the BNSF easements have been  
5 extinguished, they've been abandoned, they don't exist  
6 anymore, and that is just flatly contrary to the Trails Act.  
7 That's why the Trails Act exists. It was a response to cases  
8 like *Lawson*, which were pre-railbanking, where the state  
9 railroad easement would extinguish. The thing that keeps the  
10 state railroad easement from extinguishing is the Trails Act.  
11 And the Trails Act, by using that mechanism of preemption of  
12 any state abandonment laws, continues that easement into the  
13 future, thus allowing King County to buy it, as we did.

14 The Trails Act --

15 THE COURT: Presumably for the fact that at some  
16 point in the future, the feds need it, they'll take it back?

17 MR. HACKETT: Yes, although I believe the way that it  
18 would work is -- and, in fact, the way it does work -- is --  
19 is -- a lot of times the trail sponsor doesn't buy the  
20 corridor. We went the extra step of buying the corridor in  
21 this instance. If a bona fide railroad wanted to reactivate  
22 that, we have base reactivation petitions, then that matter  
23 goes in front of the STB, and then we are obligated to  
24 facilitate that. It might be that we have to sell the  
25 corridor or we have to rent the corridor, but these things

1 happen. Our responsibility as the trail sponsor is to make  
2 sure that that corridor remains in good shape so that it can  
3 be reactivated in a court of federal law.

4 If that --

5 THE COURT: But presumably the county could have its  
6 own light rail system through there.

7 MR. HACKETT: The county presumably could become a  
8 railroad itself and operate something along there, if we  
9 so -- because we do own the property rights.

10 If that railroad purposes easement didn't continue to  
11 exist due to the impact of the Trails Act, plaintiffs would  
12 not even have a taking in this case. They wouldn't have  
13 millions of dollars to seek before the Federal Claims Court  
14 in a Tucker Act proceeding.

15 It's that mechanism of preemption of the state law  
16 abandonment that gives them the right to takings remuneration  
17 for the taking of their reversionary interest. So, thus, the  
18 takings cases that the plaintiffs cite are really neither  
19 here nor there. They're important for determining if there  
20 are takings, but they do not address the cogent issue before  
21 this court, which is what easement remains post-taking, and  
22 that's what was addressed in *Kaseburg* and the cases cited in  
23 *Kaseburg*. Plaintiffs have failed to cite a single case to  
24 the contrary of Judge Coughenour's holdings or the cases that  
25 Judge Coughenour cites.

1 In fact, all the cases addressing this cogent point  
2 determine that the railroad easement continues, and that a  
3 trail easement is added on top of it.

4 Now, I don't think it matters whether it's a new, single,  
5 all-purpose easement or whether it's the old easement  
6 continuing plus a trail easement, but the thing that is  
7 uniform among all those courts is that the rights included in  
8 the state law railroad easement continue and the Trails Act  
9 adds trail use.

10 THE COURT: So are you claiming both the fee interest  
11 and an easement interest?

12 MR. HACKETT: No. I don't know where they get the  
13 idea that we're claiming a fee interest from.

14 In the Hornish case, we own that corridor in fee. It was  
15 not railbanked. It was part of railbanking, but railbanking  
16 doesn't extinguish a fee. The fee continues.

17 So the only thing that we're talking about with regard to  
18 the Trails Act are portions of the corridor that we own an  
19 easement, and for these plaintiffs, those are the plaintiffs  
20 in the so-called adverse possession area.

21 The problem with plaintiffs' argument is it confounds the  
22 purposes of the Trails Act with the mechanism that Congress  
23 used to achieve those purposes, that mechanism being  
24 preemption of state law abandonment of the existing railroad  
25 easement. When you preempt -- when you prevent that

1 abandonment, by definition that easement that wasn't  
2 abandoned continues.

3 There is nothing in the statute about an elaborate  
4 mechanism of having a railbank back in D.C. where they hold  
5 the easement until it's needed someday. If Congress had  
6 wanted to do that, it would have adopted a much more  
7 complicated mechanism than the one it did adopt for simply to  
8 preempt state law, thus allowing the easement to continue.

9 I want to explore a little bit, too, the practical  
10 problems with plaintiffs' approach. No way to protect the  
11 corridor up until a bona fide railroad wanting to come back,  
12 no place to go to figure out where this unknown federal  
13 easement is recorded, no way to put the property to  
14 beneficial use during the period that the interim trail use  
15 is there.

16 And let's keep in mind that right now on that trail you  
17 have crossings, you have utilities, like power and telephone,  
18 that rely on the existence of the BNSF easement to continue.  
19 The fact that that easement is there means that that property  
20 can continue to be put to beneficial use.

21 Finally, the corridor is preserved for incidental use down  
22 the road. So if somebody wants to build a new house or  
23 somebody wants to put in a new utility, the trail sponsor, in  
24 this case King County, because they own the easement along  
25 the adverse possession plaintiffs, can provide permission to

1 do that within the broad idea of a Washington railroad  
2 easement. Incidental use is allowed pursuant to that  
3 easement. It keeps property active as opposed to putting it  
4 someplace where it can't be used for any purpose.

5 THE COURT: So Mr. Morel can rest assured you're not  
6 going to put the trail through his living room?

7 MR. HACKETT: Mr. Morel, as he has done in the past  
8 with King County and he has done with the railroad, may have  
9 to pay special use permits for his use of public property,  
10 and that is the way that things are currently.

11 I'd like to address also the evidence of 100 feet is  
12 necessary.

13 You do have the Morel declaration, but Mr. Morel is not  
14 qualified to say what a railroad needs to operate. It's  
15 railroad operations. The only competent testimony before the  
16 court on that question are the Nuorala declaration and the  
17 Sullivan declaration. In addition, those establish that you  
18 do need roughly 100 feet, as the railroad purchased up and  
19 down the corridor back in the 1890s, to operate a railroad.

20 The historic documents establish this 100 feet. You have  
21 the Middleton acquiescence that I talked about in my opening  
22 presentation. You have the ICC valuation maps, of course now  
23 the STB.

24 Playing on a rock, having your swing set there, building a  
25 fort near the tracks, that does not overcome what is needed

1 for a railroad purpose.

2 The point is that if the railroad decides that that rock  
3 isn't appropriate because maybe it has larger locomotives or  
4 maybe it's concerned or maybe there is a mudslide, it can do  
5 something about that. If somebody builds a gazebo 45 feet  
6 from the tracks, and due to a derailment, or whatever  
7 happens, something needs to be done with that gazebo, by  
8 having exclusive use of possession, it's the railroad -- in  
9 this case, King County, the holder of the property, that gets  
10 to decide what uses are compatible with either the railroad  
11 or the public trail in this instance.

12 But let's say even if Mr. Morel somehow established  
13 adverse possession through his swing set and the rock and  
14 other miscellaneous uses, family picnics, which, of course,  
15 you can't do under Washington law, RCW 7.28.070 still comes  
16 into play to make this an easy, straightforward case for the  
17 court to decide a 100-foot corridor.

18 And that statute -- plaintiffs do give you a colorful  
19 argument how that statute is preempted by federal law.  
20 Indeed, the corridor is under STB regulation. The corridor  
21 is under King County control, something which the STB  
22 specifically approved in this case, due to the unusualness of  
23 a county purchasing a corridor.

24 The King County -- the federal courts, including the U.S.  
25 Supreme Court, have recognized that questions of property law

1 do fall to state law, and 7.28 is consistent with that idea.  
2 It's not a mechanism that leads to an abandonment of railroad  
3 easements, thus to be preempted; instead, 7.28 is a statute  
4 that is there to ensure that corridors remain in beneficial  
5 use, or any property remains in beneficial use.

6 We clearly hold the property under color of title. A deed  
7 granted by BNSF that describes a 100-foot corridor, we  
8 clearly have paid all taxes that have been due since 1998,  
9 and we have paid all fees.

10 Plaintiffs have nothing. They have not briefed this  
11 issue, and it's too late to come forward and argue that it's  
12 somehow preempted on a theory that, frankly, is difficult to  
13 follow.

14 So for those reasons we would ask that the court grant  
15 summary judgment. We need to have the cloud on our title  
16 removed so that we can proceed with the public trail and so  
17 that we can protect the corridor for future possible railroad  
18 use.

19 At this point, as Mr. Morel's own declaration points out,  
20 the homeowners believe that they can dictate how wide the  
21 corridor is. The homeowners believe that they can dictate  
22 how wide the trail is going to be, how it's going to be  
23 constructed, what use the public gets to make of its own  
24 property. That is not the way it is supposed to be.

25 King County, on behalf of the public, bought this

1 corridor. It paid money for that to BNSF, and, actually,  
2 through the land conservancy, it is there to place that trail  
3 for public use, and to preserve the corridor in accord with  
4 the Trails Act, and we would ask that the court remove the  
5 various clouds from title the plaintiffs are trying to put on  
6 King County's ownership of the property.

7 Thank you.

8 THE COURT: Thank you.

9 MR. STEWART: Thank you, Your Honor.

10 Mr. Hackett's recitation of the Trails Act is completely  
11 and diametrically opposed to not only what the Trails Act  
12 says, but the law on this subject.

13 By definition, by what the Supreme Court has said, by what  
14 the Federal Circuit has said, is that the railroad purposes  
15 easement is converted to a hiking and biking trail easement,  
16 and that conversion extinguishes the railroad purposes  
17 easement as a matter of law.

18 Mr. Hackett said that the Trails Act takings cases are not  
19 relevant to these proceedings, but, in essence, they are  
20 directly and exactly relevant because all of them  
21 specifically deal with the language and purpose of the Trails  
22 Act, which allows for future reactivation called railbanking,  
23 and defines that as not a current railroad purpose that  
24 allows them to use it in any fashion that they wish.

25 He also indicated that *Lawson*, which is controlling

1 precedent on this issue, came before the Trails Act was  
2 amended in 1983. But the fact of the matter is, if you look  
3 at what the Supreme Court said about *Lawson* in 1990, and if  
4 you look at what the Federal Circuit said about *Lawson* in  
5 1996, and specifically said that it was a case on all fours  
6 with *Preseault II*, which was the exact same issues that are  
7 involved in this case now, basically, then that's telling of  
8 exactly what the Federal Circuit believes.

9 And I recognize, Your Honor, that the Trails Act is not  
10 interpreted often in Seattle or other parts of the country,  
11 but I do know that it's been interpreted over 50 times by  
12 judges in the Court of Federal Claims, who deal with these  
13 issues every day.

14 I also know that, for example, on the Hilchkanum deed that  
15 Mr. Hornish -- or that applies to Mr. Hornish's property that  
16 Mr. Hackett talked about, the fact of the matter is, is that  
17 that deed was and did go to the Ninth Circuit, based upon an  
18 interpretation of Washington law that changed in 2006 in the  
19 *Kershaw* opinion.

20 And I also recognize that, although Judge Horn's  
21 interpretation of that deed, who is also a district court  
22 judge on the Court of Federal Claims, is not binding on this  
23 court.

24 THE COURT: Well, counsel, this is a national act,  
25 and I'm positive that there may be other circumstances where

1 the taking would be appropriate.

2 But counsel's pointed out that they bought it, and so  
3 whatever another judge did on the federal court of claims, I  
4 don't understand what relevance it has to me deciding this  
5 particular fact pattern. It's not binding precedent. I  
6 don't know what the fact pattern is in Vermont or Minnesota  
7 or Tennessee. All of those people may have had very good  
8 taking claims.

9 MR. STEWART: They do, Your Honor, and they did here  
10 in Seattle as well.

11 THE COURT: Well --

12 MR. STEWART: The interpretation of the Trails Act on  
13 these exact principles, under both federal and state law,  
14 although not binding, should be persuasive on these exact  
15 points. And King County --

16 THE COURT: Wait just a second. You're telling me  
17 that your clients brought taking claims to the Federal Claims  
18 Court?

19 MR. STEWART: Yes. I didn't bring them. They were  
20 brought by another attorney here on Lake Sammamish.

21 THE COURT: All right.

22 MR. STEWART: And those issues are prevalent in every  
23 takings case, just like those other cases that went to the  
24 Court of Federal Claims.

25 On the --

1 THE COURT: So what is the decision? Where is it?

2 MR. STEWART: That one is still pending, I believe,  
3 Your Honor. It may be the oldest running case in the history  
4 of Trails Act takings cases, but --

5 THE COURT: I see. So they have not been successful?

6 MR. STEWART: They've not been compensated.  
7 Liability has been determined, and they're trying to  
8 ascertain the amount of damages for the taking.

9 THE COURT: All right. Now, I asked you five  
10 questions. Are you sure that you have answered them?

11 MR. STEWART: I will run through them very quickly,  
12 Your Honor.

13 The first one, do plaintiffs dispute that King County has  
14 paid the taxes? I don't know. I think it's irrelevant. I  
15 think it is a red herring. I think that whole issue -- the  
16 railroad paid taxes for over a hundred years, and their  
17 prescriptive easement did not turn into a fee ownership just  
18 by the fact that they paid taxes, either. I'm not sure who  
19 King County is paying taxes to. I don't think King County  
20 pays taxes to themselves, and I also don't think that King  
21 County pays for the entire 100 feet, either. Honestly, as I  
22 sit here, I do not know. I'm not contesting it, though,  
23 because I don't have any specific evidence on it, and I  
24 believe it's, basically, irrelevant under the statute that  
25 that is cited.

1 Are there any disputed facts which would prevent the court  
2 from deciding this case as a matter of law? I think it  
3 depends on which issue the court decides. Obviously, the  
4 legal issues inherent in the Trails Act, no, I don't think  
5 there's any impediment for this court to decide that.

6 On the width issue, that issue has been remanded back to  
7 state court, and I think there are a number of factual issues  
8 associated with the width issue. I believe summary judgment  
9 would be wholly inappropriate.

10 THE COURT: Wait, wait. Are you telling me it's not  
11 part of my case anymore?

12 MR. STEWART: I don't believe the width of the state  
13 of this easement is part of this case, no, Your Honor, I do  
14 not. I believe that the legal principles are about how the  
15 Trails Act is to be interpreted.

16 If the width issue is part of this case now, it should be  
17 based on Washington law that has repeatedly said that the  
18 width of a prescriptive easement is to be determined by the  
19 use.

20 And there are a myriad of cases from the Washington  
21 Supreme Court on that subject. *Northwest Cities Gas* in 1943,  
22 *Mahon v. Hass* in 1970, *Yakima Valley Canal* in 1969, several  
23 precedents from the Washington Supreme Court that  
24 specifically say that the -- when the railroad receives a  
25 prescriptive easement, that it should be -- the width of that

1     easement should be determined by the use, and here the use  
2     was established over 100 years --

3             THE COURT: Counsel, you've got to back up here. I'm  
4     concerned about when is it that you think that I remanded  
5     this to state court, the 100-foot issue?

6             MR. STEWART: The case, Your Honor, was filed in  
7     state court. King County removed it to federal court, and  
8     you removed it -- or remanded it back to state court.

9             THE COURT: Okay. But that's not this case.

10            MR. STEWART: That's not this case, no --

11            THE COURT: So --

12            MR. STEWART: I don't believe the width issue is  
13     actually an issue in this case. And if it is, there are, as  
14     I've pointed out before, a myriad of factual issues  
15     associated with the width of the trail that would make it  
16     inappropriate for summary judgment, in any event.

17            THE COURT: Okay. I'd like to have you address  
18     yourself to what evidence do I have in front of me on this  
19     motion that 100 feet is not necessary -- what competent  
20     evidence do I have that 100 feet is not necessary for the  
21     running of a railroad?

22            MR. STEWART: I think there is records from Mr. Morel  
23     about how wide it is at his location.

24            THE COURT: Well, but that's one point. That's one  
25     small part. But Mr. Morel is not an engineer, is he, that

1 would be competent to talk about what railroads need for, you  
2 know, fire, safety, derailments, if they wanted to be a  
3 pick-up point, if they wanted to have a switch put in.

4 MR. STEWART: Well, Your Honor, the history of use, I  
5 think, is undisputed. They claim a 100-foot width, but  
6 they've never used a 100-foot width. And, in fact, King  
7 County has easement agreements from several landowners here  
8 at a 20-foot width.

9 And so under Washington law, if the width of a  
10 prescriptive easement is determined by the history of use --

11 THE COURT: Okay. Well, the question I had for you  
12 was, what evidence, besides Mr. Morel -- I understand he  
13 played on the rock. I query whether that was a good idea --  
14 but he played on the rock, but where is the railroad  
15 expertise that somebody would say, no, railroads don't need  
16 that, all they need is the 18 feet that the car runs down?

17 MR. STEWART: Well, I believe, Your Honor, it's based  
18 on the history of use. I do not have another affidavit from  
19 a railroad engineer. I would have provided, if our motion  
20 for an extension of time had been granted, affidavits from  
21 every one of these landowners about the width at their  
22 location. So it's not just Mr. Morel. The fact of the  
23 matter --

24 THE COURT: All right. So the answer is no. The  
25 only thing that I've got here is Mr. Morel claiming what the

1 width is at his particular site?

2 MR. STEWART: And I believe the photographs, Your  
3 Honor, that are associated with that that show the actual  
4 history of use all demonstrate that it was only used at about  
5 14-feet or 18-feet width for this entire length.

6 THE COURT: Okay. Thank you, counsel.

7 MR. STEWART: Thank you.

8 THE COURT: I'm going to come back to King County.  
9 Is the 100 feet part of this case? Because I don't remember  
10 it being eliminated.

11 MR. HACKETT: May I speak from here, Your Honor?

12 THE COURT: Yes, you can.

13 MR. HACKETT: Yes, we do believe the 100 feet is part  
14 of this case. The plaintiffs are asking for a declaratory  
15 judgment of quiet title. You can't quiet title unless you  
16 understand what the boundaries are that you're quieting title  
17 to.

18 Also in our counterclaims that we brought, we asked  
19 specifically that the court quiet title, then offer  
20 declaratory judgment. We cited 7.28. There's -- in our  
21 reply brief, I believe we have a significant section that  
22 addresses why this issue is before the court. The *Neighbors*  
23 case was remanded, has been stayed under the priority action  
24 doctrine pending the decision in this case.

25 THE COURT: Okay. Thank you.

1           Counsel, you can expect to see an opinion from me in about  
2   ten days. So I'll write for you on the topic, and that's  
3   when we'll get it out. Thank you for your arguments.

4           MR. HACKETT: Thank you, Your Honor.

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6                            (THE PROCEEDINGS CONCLUDED.)  
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## C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 18th day of May 2016.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR  
Official Court Reporter